



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 10, 2011

CBCA 2316-FEMA

In the Matter of ST. STANISLAUS COLLEGE,

Mark W. Garriga and Ronald J. Artigues, Jr. of Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Ridgeland, MS, appearing for Applicant.

Thomas M. Womack, Executive Director and Larry Bowman, State Public Assistance Office, Mississippi Emergency Management Agency, Pearl, MS, appearing for Grantee.

Linda D. Litke, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Biloxi, MS, and Valerie Rhoads, Federal Management Agency, Department of Homeland Security, Atlanta, GA, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **STERN**, **BORWICK**, and **VERGILIO**.

St. Stanislaus College, the applicant, is a boys' college preparatory school on the Mississippi gulf coast, near Bay St. Louis, Mississippi. Its facilities were severely damaged by Hurricane Katrina. The applicant, supported by the Mississippi Emergency Management Agency (MEMA), seeks a substantial disaster grant pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5172 (2006).

This arbitration is convened under Section 601 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, 164 (2009), to determine the appropriate amount of a grant award.¹ The arbitration concerns the estimated

¹By memorandum of August 6, 2009, the President assigned to the Secretary of Homeland Security the functions of the President under Section 601. 74 Fed. Reg. 40,055 (Aug. 10, 2009). The Department of Homeland Security entered into a memorandum of

cost of reconstructing two buildings at the school, a gym and the library, both of which, the applicant maintains, have been designated historic buildings under the National Historic Preservation Act. The estimated reconstruction cost would serve as a basis for the Federal Emergency Management Agency's (FEMA's) disaster grant for both buildings. Based upon an architect's evaluation of the reconstruction cost, FEMA wrote two project worksheets (PWs), PW 8172 for the gym, estimating the cost to be \$1,239,515, and PW 8943 for the library, estimating the cost to be \$2,258,504. The applicant and MEMA disagree with the estimates; both argue the grant for PW 8172 should be based on an estimated reconstruction cost of \$7,514,064.93 and that the grant for PW 8943 should be based upon an estimated reconstruction cost of \$11,170,953.12.

In addition to disputes over the reconstruction cost, FEMA deducted from its estimates portions of a \$1,500,000 Small Business Administration (SBA) loan from the two project worksheets, \$325,000 from the PW 8172 estimate and \$734,433.88 from the PW 8943 estimate.

Earlier, FEMA had allocated portions of the loan for set-off against other PWs for separate facilities at St. Stanislaus College not involved in this arbitration. Those earlier allocations were challenged by the applicant and MEMA in administrative appeals for PWs FEMA wrote for those facilities. Those appeals have yet to be decided.

FEMA moves to dismiss in whole and in part the arbitration on the following grounds. FEMA argues that consideration of the two project worksheets for the gym and library in one proceeding by the arbitration panel is not allowed because the issues are too complicated. FEMA moves the arbitration panel to dismiss the arbitration and to require the applicant and MEMA to file separate arbitrations for the two buildings. FEMA also moves to dismiss that portion of the arbitration challenging FEMA's SBA loan set-off because the set-off issue is pending before FEMA in separate a separate appeal. The applicant and MEMA resist both motions.

agreement with the Civilian Board of Contract Appeals (CBCA) under which the CBCA exercises the delegated arbitration authority of Section 601.

Discussion

Issue of single arbitration proceeding

FEMA argues that PWs 8172 and 8943 are separate projects in excess of \$500,000 and that each must be therefore be arbitrated separately. FEMA places great reliance on the notice of rule making for the arbitration procedure, found at 74 Fed. Reg. 167 at 44,761 (Aug. 31, 2009), which implements the arbitration system established by the American Recovery and Reinvestment Act of 2009. FEMA's motion at 13. The notice of rule making informs that the basis for a public assistance grant is a PW, that a PW documents the details of a project, which is a logical grouping of work required as a result of a declared disaster, and that the PW is the primary form used to document the location, dimensions, and scope of work and cost estimate for each project. *Id.* All of the above merely describes how FEMA makes decisions that are subject to appeal, arbitration, or both. *See also* 44 CFR 206.200(I). In this matter, the applicant submitted a request for arbitration based upon FEMA's PWs.

The internal appeal procedures within FEMA do not require a grantee to file separate appeals on each PW or each project. An eligible applicant or grantee may appeal "any determination previously made" by FEMA related to an application for public assistance. 44 CFR 206.206 (2010). The regulation does not prohibit applicants or grantees from submitting one appeal from multiple PWs.

The regulations regarding arbitration provide that arbitration is in lieu of filing or continuing an appeal under the appeal procedures at 44 CFR 206.206. 44 CFR 209(d) (2010). Nothing in the notice of rule making, or the regulation itself, 44 CFR 206.209, limits the arbitration panel's ability to structure arbitration proceedings in an efficient manner once FEMA makes decisions through its PWs. Those regulations state that the arbitration commences through a request which must contain a written statement and all documentation supporting the position of the applicant. 44 CFR 206.209(e). The regulations also provide that the arbitration is to be conducted by procedures established by the arbitration panel. 44 CFR 206.209(c). The regulations thus contemplate an arbitration process that is informal and flexible, adaptable to the circumstances of each case.

Here, the applicant chose to request arbitration of two PWs in a single claim. FEMA has not persuasively pointed to a rule or regulation prohibiting such a request. Arbitrating in a single session all issues presented by the applicant in its request for arbitration is the most economical method of proceeding. The single session avoids the expense of duplicate filings by the applicant and MEMA, and avoids the travel expense and lost time associated with two separate hearings. While reconstruction of the gym and the library may involve two

separate projects the matter involves the same applicant, arises out of the same disaster, and involves the same institution. Weighing all these factors, considerations of efficiency thus strongly counsel a single arbitration session.

FEMA expresses concern about the complexity of a single proceeding. The arbitration panel will provide all parties sufficient pre-hearing and hearing time to prepare and state their positions.

The issue of a separate appeal for a Small Business Administration loan set-off

FEMA argues that the arbitration panel may not hear the issue of the SBA loan set-off because it is the subject of separate internal FEMA appeals. However, as the applicant notes in its opposition, those appeals relate to PWs not involved in this arbitration. FEMA set off SBA loan funds from the PWs for the gym and the library; the applicant has the statutory and regulatory right to contest those set-offs in this arbitration. ARRA; 44 CFR 206.209. 44 CFR 206.209(d) states that a request for arbitration is in lieu of filing an appeal or continuing an appeal under 44 CFR 206.206. The election provision means that an applicant or grantee may either appeal or arbitrate a PW or project, but may not do both. The election provision does not bar an appeal of one PW and an arbitration request for a separate PW that happen to involve the same or similar legal issues.

Decision

Respondent's motion to dismiss is **DENIED**. The arbitration shall continue in accordance with the previous scheduling order.

ANTHONY S. BORWICK
Board Judge

JAMES L. STERN
Board Judge

JOSEPH A. VERGILIO
Board Judge

